

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

Docket Nos.

77-2074 & 77-4136

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UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

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DER-RONG CHOUR,

Petitioner-Appellant,

- v -

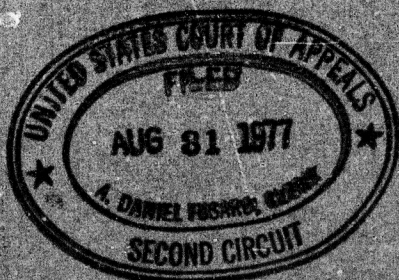
BENEDICT J. FERRO, et al.,

Respondents-Appellees.
-----x

BRIEF OF PETITIONER-APPELLANT
DER-RONG CHOUR

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Docket No.
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- v - :

BENEDICT J. FERRO, District Director, :
Immigration and Naturalization Service, :
Buffalo, New York, Or Any Other Person :
Having The Said Petitioner In His :
Custody; IIMGRATION AND NATURALIZATION: :
SERVICE, :

Respondents-Appellees. :
: :
-----X

DER-RONG CHOUR, :

Petitioner-Appellant, :

Docket No.
77-4136

- v - :

BENEDICT J. FERRO, District Director, :
Immigration and Naturalization Service, :
Buffalo, New York, IMMIGRATION AND :
NATURALIZATION SERVICE, :

Respondents-Appellees. :
: :
-----X

BRIEF OF PETITIONER-APPELLANT
DER-RONG CHOUR

PRELIMINARY STATEMENT

Petitioner-Appellant, Der-Rong Chour (hereinafter
"Petitioner" or "Mr. Chour"), appeals from an order of the
United States District Court for the Northern District of New York
(Edmund Port, D.J.) entered in the office of the clerk of that
Court on June 29, 1977, denying petitioner's petition for a writ

of habeas corpus. Petitioner has also petitioned this Court for review of an order of the Board of Immigration Appeals (hereinafter "BIA" or "Board") dated July 14, 1977, which dismissed his appeal from a decision of an immigration judge dated June 27, 1977, denying petitioner's motion to reopen his Immigration and Naturalization Service (hereinafter "INS") deportation hearing. By order of this Court dated July 19, 1977, the appeal was consolidated with the petition for review. Shortly, thereafter, Mr. Chour was released from the custody of the INS on \$10,000 bond and is not now incarcerated.

THE FACTS

In an "Order To Show Cause" and "Notice Of Hearing" (one document, A-41)* issued by the INS and dated July 18, 1974, petitioner was charged as follows:

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of China and a citizen of China;
3. You entered the United States at Baltimore, Maryland on or about February 10, 1974;
4. At that time you were admitted as a crewman authorized to remain in the United States for the period your vessel remained in port, not to exceed 29 days;

* Numbers in parentheses preceded by the letter "A" refer to page numbers in the Appendix submitted herewith.

5. You have remained in the United States beyond 29 days without authority of the United States Immigration and Naturalization Service;

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241(a)(2) of the Immigration and Nationality Act, in that, after admission as a nonimmigrant under Section 101(a)(15) of said act, you have remained in the United States for a longer time than permitted.

The circumstances of petitioner's arrest and the "inquiry" upon which the charges were purportedly based are not disclosed by the record.

Petitioner's INS Hearing

On September 4, 1974, a hearing was held on the charges contained in the "Order To Show Cause" before Immigration Judge Edward P. Emanuel in New York City (A-42-50). As must be conceded by the respondents-appellees (hereinafter "respondents" or the "INS"), and as Judge Port found on June 29, 1977 (A-77, 81), at no time during the hearing had petitioner been informed of his rights to cross-examine witnesses, examine and object to evidence, present evidence and appeal the immigration judge's decision to the BIA. Nor was Mr. Chour represented by an attorney at the hearing.

Before questioning the petitioner (according to one of the two versions of the transcript supplied and certified as correct by INS transcribers) Immigration Judge Emanuel advised the petitioner (through an interpreter, as petitioner speaks little, if any, English) as follows (A-43):

Q You have a right to have a lawyer or other authorized representative of your own selection but without cost to the government. However, you are not required, you are not authorized to have such a person you can go ahead without one and speak for yourself as you prefer. What will you do about having or not have (sic) such a person? (emphasis supplied)

The petitioner responded (through the interpreter):

"A I will speak for myself."

Thereupon, the petitioner was asked questions similar to the numbered allegations in the "Order To Show Cause" and answered each in the affirmative (A-43-44). Immigration Judge Emanuel found that the petitioner was a deportable alien and granted voluntary departure. The period for voluntary departure was fixed at "one month" (A-45). However, when petitioner requested additional time in which to depart, he was informed that (A-45):

I.J. I will not give you more time. If you show that you have been diligently able to buy a ticket but cannot do so, then come back here a few days before the month is up and maybe if you have a good reason an extension of time will be then given to you. . . .

The "Decision Of The Immigration Judge" provided for voluntary departure in lieu of deportation on or before October 4, 1974, and that, failing voluntary departure, Mr. Chour was to be deported to Taiwan (A-93). The record does not disclose whether the petitioner ever applied for additional time in which to depart or whether he actually received and understood the decision.

Petitioner's Arrest And The Petition For Habeas Corpus

On or about June 7, 1977, Mr. Chour was arrested by INS officials in Albany, New York and held without bond on an INS "Order To Show Cause" charging that he was a deportable alien. However, before a hearing was held on that order, the order was canceled and petitioner was held for immediate deportation on the basis of the September 4, 1974 order of Immigration Judge Emanuel.

A petition for a writ of habeas corpus was immediately brought in the Northern District of New York before Judge Edmund Port, sitting in Auburn. On June 10, 1977, Judge Port heard an emergency application and issued an oral stay. Thereafter, on June 15, 1977, Judge Port signed an Order To Show Cause, which provided for a stay of the order of deportation pending the hearing and determination of the petition, discovery by the petitioner of the INS record and a hearing date of June 29, 1977 on the habeas corpus petition (A-34).

The Administrative Motion To Reopen

Pending the hearing on Mr. Chour's petition for a writ of habeas corpus, an administrative "motion to reopen" was made before Immigration Judge Gordon Sacks in Buffalo, New York. The motion was made on two bases: first, that petitioner was denied his due process rights at the deportation hearing; and second, that he had since acquired equities in favor of his remaining in the United States, including his engagement to a permanent resident and his having obtained a labor certification as a mechanic (A-23-24).

The motion to reopen was denied by Judge Sacks on June 27, 1977 (A-36).

The Hearing Of The Petition For A Writ Of Habeas Corpus

By the time of the hearing before Judge Port in Auburn, New York on June 29, 1977, the INS had supplied to petitioner's counsel a copy of the transcript of the deportation hearing. Because the transcript indicated that Mr. Chour had not been advised of his statutory and regulatory rights at the September 4, 1974 deportation hearing, the petitioner proceeded on the basis of that transcript (A-55). Indeed, the "Traverse", the "Reply Affidavit In Support Of Petition" and the "Memorandum Of Law In Support Of Petition For A Writ Of Habeas Corpus" all relied upon the errors in the transcript which the INS had annexed as an exhibit to its June 24, 1977 "Supplementary Answer In Opposition To A Writ Of Habeas Corpus". It appeared from that transcript that Immigration Judge Emanuel had informed the petitioner that he was 'not authorized' to have an attorney (A-43).

At the June 29 hearing, counsel for petitioner were, for the first time, made aware that there were two versions of that transcript in existence (A-56). The version which the INS relied upon, and had supplied to the Court, differed in substantial part from the one INS had supplied to petitioner's counsel, in that the words "not forced" were substituted for the words "not authorized" [to have an attorney] at the INS hearing (A-47).

Also at the June 29 hearing petitioner was, for the

first time informed, as was the Court, that his motion to reopen had been denied by Judge Sacks on June 27, although it had not been scheduled to be heard until June 30 (A-73).

During the course of the hearing, Judge Port found that the petitioner had not been advised of his right to appeal to the BIA (A-77). Judge Port also saw (A-81-82):

no place in the transcript where the petitioner was advised that he would have a reasonable opportunity to examine and object to the evidence against him, to present evidence on his own behalf and to cross examine witnesses presented by the government.

However, Judge Port did not decide whether those errors mandated vacating the order of deportation and releasing the petition from INS custody (A-82):

Whether that's an omission of substantial nature or of a nature of a harmless error I don't pass on because I don't think it's necessary to in this proceeding at this time. . . .

Although the Court did find that Mr. Chour understood the nature of the proceeding, was advised of his right to an attorney (both of which findings are herein disputed) and "admitted the charges", the Court's apparent reason for dismissing the petition was its belief that the petitioner had not exhausted his administrative remedies (A-86-87):

This appears to be clearly a case within the Congressional scheme or pervue that the administrative remedy should be availed of and exhausted before any application is made such as the one being made here.

The fact that the petitioner has a remedy is demonstrated most clearly I think by the

fact that he has taken it. He's petitioned for a reopening. The very grounds that he seeks to reopen are the same grounds that he seeks relief from this Court. I think it would be an unwarranted and unjustified interference with the procedures set up by the Congress for me to interfere at this juncture. The statute makes it clear, Title 8 Section 1105A (c) that a deportation order should not be reviewed by any court until all of the administrative remedies have been exhausted and then the judicial review lies with the Court of Appeals.

I'm always puzzled as to whether the court has jurisdiction or not when there's this failure to exhaust, but in any event I think it mandates a dismissal of the Writ.

On that basis, the Court issued an order, filed June 29, 1977, denying the petition for a writ of habeas corpus (A-37-38), but continued its stay of the order of deportation for a period of ten (10) days so as to permit the petitioner to pursue his administrative and judicial avenues of appeal.

The Appeal To The BIA From The Denial Of Petitioner's Motion To Reopen

Petitioner appealed Immigration Judge Sacks' June 27, 1977 decision denying the motion to reopen to the BIA. As the primary basis of his appeal, petitioner argued, as he will here, that he was denied his Fifth Amendment right to due process of law, in that the INS and immigration judge failed to advise him of rights guaranteed to him by statute and regulation, including the rights to be represented by an attorney, examine and object to the evidence against him, cross-examine witnesses, present evidence in his own behalf, to appeal the BIA, and to be properly advised of all these rights (which is, in itself a right guaranteed

by INS regulations). Another basis for the appeal was, of course, petitioner's equities in the United States, as previously outlined herein at page 5, supra.

The BIA, in a two-page opinion, acknowledged that at least one right was denied to petitioner at the September 4, 1974 hearing, but held (A-40):

We are satisfied that the conduct of the September 4, 1974 hearing was not of such a nature as to vitiate the finding of deportability. . . .

The appeal was thus dismissed by the BIA on July 14, 1977.

STATEMENT OF THE ISSUES PRESENTED

On the facts recited above, the following issues are presented on this appeal:

1. Where a respondent at a deportation hearing appears without an attorney, speaks little, if any, English and is advised of none of the rights given him by statute and regulation, has he been denied procedural due process under the Fifth Amendment to the United States Constitution?
2. Can such a denial constitute harmless error?
3. Was the denial of the motion to reopen an abuse of discretion under the facts of this case?

ARGUMENT

Point I

PETITIONER WAS DENIED DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AT HIS DEPORTATION HEARING

A. The Statutory and Regulatory Rights of Aliens at Deportation Hearings

It is clear that an alien at a deportation hearing has the statutory rights, among others, to:

- (1) be represented by an attorney of his own choosing (at no expense to the Government);
- (2) to have an opportunity to examine the evidence against him;
- (3) to present evidence in his own behalf; and
- (4) to cross-examine witnesses. (8 U.S.C. § 1252(b)(2) and (3).*

Indeed, an alien's right of counsel in deportation proceedings has been considered so important and fundamental a right in the Congressional scheme as to merit the devotion of an individual section of the law to its enunciation. 8 U.S.C. § 1362 states:

In any exclusion or deportation proceeding before a special inquiry officer and in any appeal proceedings before the Attorney General from any such exclusion or deportation proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.

*Such statutes are, of course to be strictly construed against the INS. Rehman v. Immigration and Naturalization Service, 544 F.2d 71, 74 n.6 (2d Cir. 1976); Lennon v. I.N.S., 527 F.2d 187, 193 (2d Cir. 1975) (wherein this Court stated, "It is settled doctrine that deportation statutes must be construed in favor of the alien.").

The right to be represented by an attorney is reflected in the rules of the Department of Justice, Immigration and Naturalization Service. 8 C.F.R. § 292.5(b). Other provisions of those rules require that the alien be informed of his rights.

8 C.F.R. § 242.16(a) provides in relevant part:

The special inquiry officer shall advise the respondent of his right to representation, at no expense to the Government, by counsel of his own choice authorized to practice in the proceedings and require him to state then and there whether he desires such representation; advise the respondent that he will have a reasonable opportunity to examine and object to the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the government; place the respondent under oath; read the factual allegations and charges in the order to show cause to the respondent and explain them in nontechnical language, and enter the order to show cause as an exhibit in the record. . . .(emphasis added)

Beyond these provisions, containing the rights to be afforded an alien at the beginning of a deportation hearing, the rules of the INS provide that an alien has a right to appeal to the BIA from the decision rendered at the deportation hearing. 8 C.F.R. §§ 3.3(a) and 242.21. Those rules also provide that the alien is to be advised of his right to appeal. 8 C.F.R. §§ 3.3(a) and 242.19.

B. The Rights Denied Petitioner

It is respectfully submitted that there can be no dispute that the petitioner, who spoke Mandarin, rather than English, was simply not informed that he had the rights to have an opportunity to examine and object to the evidence against him, to present

evidence in his own behalf, to cross-examine witnesses or to appeal the decision of the immigration judge.

It also cannot be disputed that the petitioner was not represented by an attorney at the deportation hearing. Nor can it be presumed that, at the time of the hearing, he knew anything whatsoever about the rights he possessed. In obvious recognition of the uselessness of rights which are unknown to the persons intended to be benefited, the INS regulations specifically provide that the alien shall be advised of those rights, including the right to be represented by counsel of his own choice. 8 C.F.R. § 242.16(a) (quoted, in relevant part, above at page 11).

Given the obvious importance of the right to counsel, and the obligation undertaken by the INS to advise the alien of the right, it is petitioner's position that the alien must be properly advised. Without proper advice, it cannot be said that there has been an informed waiver. Here, the INS has made no showing that Mr. Chour was properly advised of his right to counsel so as to have knowingly waived that right.

Two versions of the transcript of the September 4, 1974 deportation hearing were supplied by the INS in petitioner's habeas corpus proceeding. Both were certified as correct by INS transcribers. In the copy supplied to petitioner's counsel, Mr. Chour was "informed" of his right to counsel as follows (A-43):

Q You have a right to have a lawyer or other authorized representative of your own selection but without cost to the government. However, you are not required, you

are not authorized to have such a person,
you can go ahead without one and speak for
yourself as you prefer. What will you do
about having or not have (sic) such a person?
(emphasis supplied)

In the version submitted to Judge Port, the words
"not forced" were substituted for the words "not authorized".
It is unknown which version correctly reflects the actual words
spoken at the hearing.

Clearly, it cannot be said that Mr. Chour was properly
advised of his right to counsel if the version of the transcript
quoted above is considered. The impact of having been told "you
are not authorized" to have counsel must surely have been great,
so great on a person unfamiliar with administrative proceedings
generally, and deportation proceedings in particular, that the
intended "advice" must have been rendered meaningless. Indeed,
the whole tone of the second sentence of the quoted phrase may be
heard as coercive, seeming to give the impression that the
immigration judge hoped to hear that the petitioner would "prefer"
to "go ahead without [an attorney] and speak for [himself]" and
petitioner had not been informed of his right to object.

Nor was petitioner at any time advised that the hearing
could be adjourned to give him sufficient time to retain counsel,
as is the normal policy and practice of the INS and its immigration
judges. (8 C.F.R. § 242.13 provides for situations in which
adjournments are sought for the purpose of obtaining counsel.)
Therefore, petitioner, who appeared without an attorney, had no
possible way of knowing that he could get an adjournment of the

hearing in order to obtain representation.

On these bases, it is submitted that no waiver could be found when petitioner stated, "I will speak for myself."

It must, therefore, be seen that petitioner was not properly advised of his right to representation. Cf. Haidar v. Coomey, 401 F.Supp. 717, 721 (D.Mass. 1974), appeal denied, 530 F.2d 962 (1st Cir. 1976). Petitioner was thus denied every right given him by statute or regulation.

C. Petitioner Was Denied Due Process

The failure of the INS to follow its own administrative rules and regulations, which are mandated by statute to protect the rights of parties to deportation proceedings, violated petitioner's right to due process of law and requires the order of deportation to be vacated.

In United States of America v. Gasca-Kraft, 522 F.2d 149, 152 (9th Cir. 1975), the Ninth Circuit held that

. . . due process requires that the respondent in a deportation hearing receive timely notice, that he have an opportunity to be heard, to cross-examine witnesses against him, and to produce evidence, that the decision be based on the evidence and only on the evidence produced at the hearing, and that the decision be supported by substantial evidence. . . .

Of course, the Gasca-Kraft holding is merely a restatement, applied specifically to the regulatory requirements of deportation hearings, of the now familiar principle, announced by the Supreme Court in Accardi v. Shaughnessy, 347 U.S. 260 (1954) (itself an immigration case), that an agency's violation of its own regulations may, in and of itself, constitute a violation of due process.

See also, Bridges v. Wixon, 326 U.S. 135, 153 (1945).

Thus, "[a]n agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down." United States v. Heffner, 420 F.2d 809, 811 (4th Cir. 1970). The rule exists because, as this Court has stated, such failures "cannot be reconciled with the fundamental principle that ours is a government of laws, not men." Hammond v. Lenfest, 398 F.2d 705, 715 (2nd Cir. 1968).

Nor does the applicability of the principle depend upon the form in which the administrative policy may be found. See, e.g., United States v. Heffner, supra., at 812 (IRS instructions); Smith v. Resor, 406 F.2d 141, 143-44 n.2, 146 (2nd Cir. 1969) (Army newsletter); Sangamon Valley Television Corp. v. United States, 269 F.2d 221, 224-25 (D.C. Cir. 1959) (usual FCC practice). Cf. Yellin v. United States, 374 U.S. 109, 116-17 (1963) (prior congressional behavior).

And it is not relevant that the administrative policy may be "more generous than the Constitution requires". United States v. Heffner, supra., at 812. In that case, IRS's failure to follow its own policy on giving warnings before taking the statements of persons under investigation for tax fraud was used to reverse Heffner's conviction, even though there was admittedly no custodial interrogation when his statement was given.

Thus, assuming, arguendo, that aliens, absent statutory and regulatory provisions, have no constitutional rights at depor-

tation hearings to be represented by an attorney, examine and object to the evidence against them, offer evidence in their own behalf, cross examine witnesses or take an appeal, once statutory and regulatory provisions embodying those rights are in effect, the rights are guaranteed to aliens as a matter of due process. How, indeed, could it be said that a person who has been denied his statutory and regulatory rights has been treated with fundamental fairness? As the Supreme Court stated in Bridges v. Wixon, supra , at 154:

We are dealing here with procedural requirements prescribed for the protection of the alien. Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty - at times a most serious one - cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.

It is respectfully submitted that the principle announced by the Supreme Court in Accardi v. Shaughnessy, supra , should be followed here, the order of deportation vacated, and the matter remanded to the INS for a deportation hearing consistent with petitioner's statutory and regulatory rights.

Point II

THE ERROR REQUIRES A REVERSAL

Although the Court below did not find it necessary to decide whether or not the errors in the record of petitioner's depor-

tation hearing required vacating the order of deportation,* the BIA did find the errors "harmless". Petitioner believes that the error was not "harmless".

When confronted with error similar to the errors here complained of, the United States Court of Appeals for the Seventh Circuit has refused to apply a "harmless error" rule. In Castaneda-Delgado v. Imm. and Natural. Serv., 525 F.2d 1295 (7th Cir. 1975), that Court held that the denial of the statutory right to counsel at a deportation hearing required that the hearing be declared a nullity and that the order of deportation issued pursuant thereto be vacated. There, petitioners, two Spanish-speaking adults, were, at their initial deportation hearing, granted a two-day adjournment to obtain counsel. When, on the adjourned date, they requested a further adjournment for the same purpose, that request was denied. They were then questioned and ordered deported on the basis of their answers. Fortunately, they (unlike the petitioner here) were advised of their right to appeal to the Board of Immigration Appeals, which affirmed the deportation order. The Court of Appeals reversed the Board, stating in part (at 1302):

The language of Sections 242(b)(2) and 292 of the Immigration and Naturalization Act, 8 U.S.C. §§ 1252(b)(2) and 1362 (1970), as implemented by

*The district court, as noted above, found that it lacked jurisdiction as petitioner, having made a motion to reopen, had not yet exhausted his administrative remedies. Although petitioner does not agree with the correctness of that holding, the issue would now seem moot in light of the BIA decision currently before this Court.

the regulations, clearly and unambiguously grants aliens the right to counsel of their choice in deportation proceedings. Such provisions are an integral part of the procedural due process to which the alien is entitled. Chlomos v. INS, supra., 516 F.2d at 313. These provisions would be eviscerated by the application of the harmless error doctrine, and we see no justification for such evisceration.

This Court has not as yet decided the question. See, Ballenilla-Gonzalez v. Imm. & Nat. Serv., 546 F.2d 515, 520 n.10 (2d Cir. 1976).

It would seem that the holding in Castaneda-Delgado is consistent with the Supreme Court's holding in Accardi. There, the Supreme Court, obviously doubtful that there would be a different result at a new hearing stated (Accardi v. Shaughnessy, supra, at 268):

If successful, he may still fail to convince the Board or the Attorney General, in the exercise of their discretion, that he is entitled to suspension, but at least he will have been afforded that due process required by the regulations in such proceedings.
(emphasis supplied)

In United States v. Heffner, supra, at 813, citing part of the above quoted language from Accardi, the Fourth Circuit held:

The Accardi doctrine furthermore requires reversal irrespective of whether a new trial will produce the same verdict. In both Yellin v. United States, 374 U.S. at 121, 83 S.Ct. 1828, 10 L.Ed.2d 778, and Accardi itself, 347 U.S. at 268, 74 S.Ct. 4-9, 98 L.Ed. 681, the Supreme Court vacated government actions and remanded for new determinations consistent with the established procedures even though the Court doubted that these procedures would lead to a different result. Even though it was unlikely that the appellant would prevail

on remand, the Court held that he "should at least have the chance given him by the regulations." *Yellin v. United States*, 374 U.S. at 121, 83 S.Ct. at 1836.

It is respectfully submitted that the Accardi doctrine "call[s] for the prophylactic remedy of vacating the order of deportation and for writing thereafter on a clean slate." Castaneda-Delgado v. Imm. and Natural. Serv., supra, at 1302.

Quite apart from the Accardi doctrine, however, the facts of this case are such as to warrant a finding that the error was not "harmless". For instance, the record does not disclose whether or not Mr. Chour had any defense to the charges against him or any equities which might have influenced the immigration judge's decision - it could not, because Mr. Chour, who appeared without an attorney and was not properly advised that he could be represented by one, also was not advised that he could present evidence. Similarly, Mr. Chour may well have made statements upon his initial arrest under such circumstances that the statements would have been inadmissible at the administrative hearing, or the INS officials who arrested him might have conducted an illegal search.* (See, 8 U.S.C. §§ 1252 and 1357; 8 C.F.R. § 287.3) But petitioner was not advised that he had a right to object to any such evidence. In fact, Mr. Chour did not know that he had a

*Of course, since the INS has never permitted petitioner's counsel to view its file in this matter, although Judge Port ordered discovery, it is impossible to know whether or not the petitioner could have made such claims.

right to object to anything in the proceeding. Because he was not informed of his rights, he may have been denied other rights. In short, his hearing was rendered fundamentally unfair by the very nature of the error.

POINT III

UNDER THE FACTS OF THIS CASE, THE DENIAL OF THE MOTION TO REOPEN WAS AN ABUSE OF DISCRETION

Although the motion to reopen was based in substantial part on the failure of the INS to afford petitioner his statutory and regulatory rights, it was also based in part on new facts which would afford him certain equities and an opportunity to adjust his status to that of a permanent resident (although the final adjustment would have to be outside of the United States).

At the time of his motion to reopen, the petitioner was engaged to marry a permanent resident of the United States, and had a labor certification as a mechanic. The labor certification would make him eligible to adjust his status pursuant to a sixth preference petition.

Thus, wholly apart from the denial of his rights, there existed new facts which would warrant a reopening. The denial of the motion to reopen was an abuse of discretion. Cf. Yee Dai Shek v. INS, 541 F.2d 1067 (4th Cir. 1976).

CONCLUSION

The order of the Board of Immigration Appeals dismissing petitioner's appeal should be vacated and the matter remanded to the Board with instructions to vacate the order of deportation entered September 4, 1974.

Dated: New York, New York
August 31, 1977

Respectfully submitted,

LAW OFFICES OF DAVID C. BUXBAUM, P.C.
Attorneys for Petitioner-Appellant
Der-Rong Chour

Of Counsel:

David C. Buxbaum
Michael J. Kopcsak

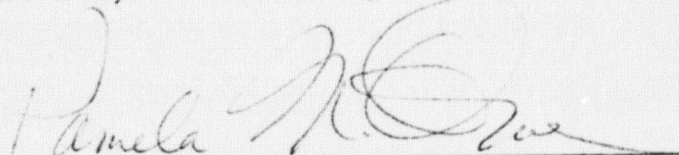
AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

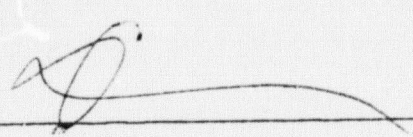
PAMELA M. OWEN, being duly sworn, deposes and says:

1. Deponent is not a party to the within action, is over 18 years of age, and resides at 1553 Ocean Avenue, Brooklyn, New York.

2. That on August 31, 1977 deponent served a true copy of the "Brief of Petitioner-Appellant Der-rong Chour" and the "Appendix" upon Robert S. Fiske, Jr., Esq., United States Attorney for the Southern District of New York, at One St. Andrew's Plaza Annex, New York, New York 10007, Attention: Robert S. Groban, Jr., Esq., by depositing same in a post-paid properly addressed wrapper in an official depository under the exclusive care of the United States Post Office in and for the City of New York, New York.


Pamela M. Owen

Sworn to before me this
31st day of August, 1977.



DAVID C. BUXBAUM
NOTARY PUBLIC, State of New York
No. 2610648
Qualified in Kings County
Commission expires March 30, 1979